Mar 31, 2000

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Supreme Court, U.S.
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No. 99-401

In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, *et al.*,

Petitioners,

vs.

BILL JONES,
Secretary of State of California, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE ALASKAN VOTERS FOR AN OPEN PRIMARY (AVOP) IN SUPPORT OF RESPONDENTS

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I

INTERESTS OF AMICUS CURIAE[1]

Alaskan Voters for an Open Primary (AVOP) is a group of about 80 Alaskan voters of all political persuasions. The Alaska Women's Political Caucus, with over 300 members (both men and women), is also a member. AVOP's interest is to uphold the constitutionality of the Alaska blanket primary statutes and retain for all Alaskan voters the broadest possible choice in the primary election. AVOP was allowed to intervene before the Alaska Supreme Court in *O'Callaghan v. State of Alaska*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 520 U.S. 1209 (1997), which upheld Alaska's blanket primary statutes against a similar constitutional challenge.

II

SUMMARY

AVOP submits this brief for two reasons:

1. to explain how the Alaska blanket primary election (popularly termed the "open" primary in Alaska) has historically worked and the very limited role that political parties play in it,[2] and

---

[1] This brief is filed with the written consent of all parties. These have been filed with the clerk of the court. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus, its members, or counsel make a monetary contribution to the preparation or submission of this brief.

[2] At the trial in this case, though "substantial evidence" was presented as to how the blanket primary has operated in

2. to comment briefly on important points raised in the other briefs insofar as they affect Alaskan voters.

III

ARGUMENT

A. HISTORY OF ALASKA'S BLANKET PRIMARY AND THE ROLE OF POLITICAL PARTIES UNDER ALASKA'S BLANKET PRIMARY STATUTES.

Prior to 1947 the Territory of Alaska had an open primary.[3] Voters were given a single ballot listing candidates by party in columns separated by black lines. Voters could cast ballots in only one column. Crossing the line disqualified the entire ballot. This was popularly known as the "black line" ballot.

In 1946 a blanket primary bill was introduced in the territorial legislature, but did not pass. As a compromise, the question was put to the voters in a referendum at that year's general election. It passed by a wide margin. Unofficial returns from 46 of 60 precincts showed 4,225 favoring the blanket primary and only 878 opposed (83% – 17%). The next territorial legislature passed the blanket primary bill. In the house the vote was unanimous. Four senators voted "no."

Washington for the past 60 years, such historical evidence was not presented about Alaska. According to Respondents, Petitioners' experts acknowledged that they were unfamiliar with this history. Respondents' Brief Section IV A.

[3] See Gordon S. Harrison, *Alaska's Blanket Primary: Background Information and Legislative History* (Research Request 90.294, May 23, 1990) at 2 ("Harrison"), attached as Appendix "A." This was quoted extensively by the Alaska Supreme Court in *O'Callaghan* at 1255-56.

The blanket primary issue, however, became increasingly partisan. Democrats generally opposed it and Republicans supported it. Democrats believed it eroded party loyalty and discipline and feared Republicans were using it to "raid" the Democratic primary to elect the weakest Democratic candidates. Republicans hoped to use the blanket primary to attract conservative Democrats and Independents. Independents favored the measure and party loyalists in both camps opposed it. As Dr. Harrison said,

> "Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary."[4]

In the first session of the first state legislature in 1959, with the Democrats controlling both houses and a Democratic governor, the blanket primary statutes were repealed and the "black line" primary reinstated.[5]

That primary was called the "**party** primary nomination." (emphasis added).[6] AS 15.25.010 provided:

> "At the party primary nomination, political parties shall nominate their candidates for the elective state executive and state and national legislative offices to be placed on the next general election ballot."

AS 15.25.030(12) required each candidate to sign a declaration under oath "that the candidate if nominated

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[4] Harrison at 5.

[5] Ch. 41 SLA 1959.

[6] AS 15.25.010-.080.

and elected will support the principles of the party he seeks to represent." AS 15.25.070 provided that no one could vote for a person whose name was not on the ballot "or vote for candidates in more than one column." "[V]otes for candidates in more than one party column shall not be counted, and [if so voted] the entire ballot is invalid." AS 15.25.080 allowed voters to declare their party preference, but did not require them to do so. Election judges were required to ask each voter if they desired to declare a party preference before giving them a ballot. The official was required to record the preference, if one was declared. *Id.*

During the next four legislatures, Republicans sought to reinstitute the blanket primary. Many Democrats also wanted it. Legislation was regularly introduced, but died in committee.

In 1966, a blanket primary bill passed the house and almost passed the senate. Legislators of both parties supported the reform. Senator Robert Ziegler (D. Ketchikan) stated,

> "The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voting want to vote for the man, not the party."[7]

Nonetheless, the bill failed.

That year the Republicans swept both houses and took the governor's mansion. In keeping with Governor Walter Hickel's campaign promise, HB1 was introduced

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[7] Harrison at 4.

at his request. It passed 34-5 in the house, 18-2 in the senate, and was enacted as Ch. 1 SLA 1967.

The bill was entitled:

> "An act giving voters the right to vote for candidates without regard to party affiliation in primary elections."

It generally did away with all reference to the "party primary nomination," and called the August ballot the "primary election." AS 15.25.010 now provided:

> "Candidates for . . . elective . . . offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter."

The term "primary election" was also substituted throughout.

AS 15.25.030(12) continued to require a loyalty oath. AS 15.25.060 was amended to read,

> "The secretary of state shall place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation."

AS 15.25.070 struck all references limiting a voter's participation to one party's primary. AS 15.25.080 was amended to require the secretary of state to provide a space in the official voter registration book where a voter might, if desired, record his or her party preference. No longer would the election judge be required to ask a party preference before handing the voter a ballot. At some point between 1967 and 1980, the loyalty oath statute was repealed. There is no longer a requirement that a candidate, even if nominated and elected, must support the

principles of their party. Nor is there any longer a statute even permitting voters to declare their party preference when they vote.[8]

On March 31, 1990, the Republican Party of Alaska ("RPA") enacted new party rules to limit its primary election to registered Republicans, registered Independents, and those who declined to state a party preference. The RPA sued the state in federal court, claiming it had a right under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), to hold its own partly closed primary. The state entered into a consent decree, under which the Director of Elections agreed, despite the blanket primary statutes, to promulgate regulations implementing the Republican closed primary election along with a blanket primary for all other candidates and voters. Republican candidates were limited to their primary and all other candidates to the blanket primary. Eligible voters could choose either ballot, but voters registered to other political parties were limited to the blanket primary.

Two partly closed Republican primary elections, in 1992 and 1994, were conducted under the regulations. An Alaskan voter, Michael O'Callaghan, challenged the regulations in state court and in March 1996 the Alaskan Supreme Court declared them unconstitutional.[9] Since then Alaska has conducted its primaries under the blanket primary statutes.

Our state has one of the highest, if not the highest, percentages of non-partisan and independent voters. As

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[8] Section 231, Ch. 100, SLA 1980 repealed AS 15.25.080.

[9] *O'Callaghan, supra.*

of March 1 of this year, out of a total of 462,423 registered voters in the state, 112,621 were registered Republicans (24%), 76,401 registered Democrats (17%), 18,933 registered members of the Alaska Independence Party (4%), 6,966 registered Libertarians (1.5%), 3,327 registered members of the Green party (0.7%), 1,524 Republican Moderates[10] (0.3%), and 4,970 members of other parties (1%). There were also 159,231 undeclareds (34%), and 78,450 non-partisans (17%).[11] 51% of all voters register as either undeclared or non-partisan.

Under Alaska law the political parties play virtually no role in the conduct of the blanket primary. Candidates self-declare their party affiliation when they file for office.[12] As noted above, voters do not have to declare a party affiliation.[13] The parties traditionally do not endorse in the primary. Their role is mainly confined to recruiting candidates, helping to raise money, and coordinating efforts between campaigns. Under state law their only official role is to place on the primary ballot by petition a substitute candidate, if an unopposed incumbent dies before the primary election,[14] or to replace, by petition, on the general election ballot a nominee who has died, become disqualified, withdrawn, or resigned after the primary.[15]

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[10] Not to be confused with Republicans.

[11] Source: Alaska State Division of Elections printout. See Appendix "B."

[12] AS 15.25.030(a)(5) and (16).

[13] See n.10, supra, and accompanying text.

[14] AS 15.25.056.

[15] AS 15.25.110-.130.

Candidates are identified by party affiliation on both primary and general election ballots.[16] However these party labels simply help voters identify candidates politically. They do not signify endorsement or any involvement by political party organizations in the primary election process.

There is a crucial distinction between candidates labeling themselves politically and the party organizations having any authority to conduct the election. Although they participate in election campaigns, Alaskan political parties do not participate in the primary election itself any more than they participate in the conduct of the general election.

B. RESPONSE TO CERTAIN ARGUMENTS OF PETITIONERS AND SUPPORTING AMICI

1. AVOP respectfully suggests that the core issue is probably best put in the amicus brief of the Northern California Committee for Party Renewal et al., at 14: "Whether a political party or the state has the right to establish the type of primary – blanket or closed."

2. The parties claim their right of association is paramount. The states claim their right to govern the "time, manner and place of elections, is most important,[17] and the voters claim their right to vote is paramount.

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[16] AS 15.25.060, AS 15.15.030(5).

[17] US Const. Art. I § 4 Clause 1. For the equivalent state constitutional provision, see Alaska Const. Art. V § 3 ("Methods of voting, including absentee voting, shall be prescribed by law.")

That the federal constitution explicitly directs state legislators to establish federal elections and that the constitution was drafted before there were political parties should provide some weight to the states' (and the voters') position here. The constitution directs state legislatures, not political parties, to establish the method of federal elections. Unless the state is unable to justify curtailing the associational rights of political parties (as in *Tashjian*), its efforts to enfranchise large members of voters should not be struck down.

3. The Political Parties and their supporting amici generally proceed from the premise that they have the constitutional right to control blanket primary elections, even in the face of state law. They must concede that, if this premise fails, so does their argument.

Yet:

a. 23 states "use some version of the open primary,"[18] three have blanket primaries,[19] and Louisiana has a nonpartisan primary. The primaries in these 27 states have been free from control by political parties for many years. This is powerful evidence of their constitutionality.

On the other hand, invalidating California's blanket primary will have severely disruptive political consequences across the country. This Court should not take such a step lightly.

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[18] Amicus brief for the Brennan Center at 5 n. 8 and accompanying text.

[19] Alaska, California, and Washington.

None of the 23 open primary states or Louisiana has participated in this case (nor has the federal government which, itself, has an interest in maintaining political stability in the states). Surely, if they felt their primary election systems were seriously threatened, these states would be participating. If the Court is inclined to declare most states' primary election laws unconstitutional, they should at least be notified and invited to participate. And there may well be other citizen groups like AVOP, who would want to file amicus briefs. (This was the step the Alaska Supreme Court took when the Alaska case was initially argued).[20]

b. Every court that has considered the constitutionality of blanket primary statutes against the challenge raised here has upheld it. *Heavey v. Chapman*, 93 Wash.2d 700, 611 P.2d 1256 (1980), *O'Callaghan v. State of Alaska*, supra, and *California Democratic Party v. Jones*, 169 F.3d 646 (9th Cir. 1999). Only one jurist, Justice Rabinowitz of the Alaska Supreme Court, has even dissented. *O'Callaghan v. State of Alaska*, supra, at 1264.

c. As the other briefs have pointed out, the case upon which the Political Parties primarily rely, *Tashjian v. Republican Party of Connecticut*, supra, was the opposite factual situation. There one political party wanted to open up its primary and the state wanted to close it. The issue and the important public policies of expanding the franchise are different here.

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[20] See *O'Callagahn v. Coghill*, 888 P.2d 1302 (Alaska 1995) (Order and Memorandum Opinion). That published order was virtually without precedence since statehood.

But something else is different, too. That case was decided on a 5-4 vote in this Court. All members of that majority are gone, and all the dissenters remain. Now may be a good time to re-examine the holding in *Tashjian* to determine whether it has any application beyond the unusual factual pattern presented. Does this Court want that case to be the legal precedent for overturning the open, blanket, and nonpartisan primary election statutes in 27 states? Was this result envisioned when that case was decided? And, most importantly, did it represent the best public policy decision at the time?

AVOP suggests that it **did** (because it expanded the franchise), but the contours of that case should be carefully delineated now, so that it cannot be similarly misinterpreted in the future. This case presents the opportunity to clarify *Tashjian* and, at the same time, strengthen the right to vote.

Political parties may not like it if they cannot seize control of the blanket and open primary election process, but they certainly will understand why. And that, too, will provide important stability to the political process.

IV.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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Legislative Research Agency

May 23, 1990

MEMORANDUM

TO:

ATTN:

FROM: Gordon S. Harrison, Director

RE: Alaska's Blanket Primary: Background Information and Legislative History
Research Request 90.294

You asked for background information about Alaska's blanket primary (AS.15.25.060), including its legislative history.

State Primary Election Schemes

State primaries are broadly categorized as closed, open, or blanket, although the actual variation in systems is far greater and more subtle than this simple classification scheme suggests. Closed primaries require the voter to declare a party preference before election day, usually at the time of registration. At the polling place, the voter is given a ballot listing only candidates of the party of his or her declared preference.

Open primaries differ from closed primaries only with regard to the declaration of party affiliation before election day. Like voters in a closed primary, voters in open primaries are limited to casting ballots for the candidates of a single party. However, voters in open primaries are asked at the polling place to name the party ballot they want to vote, or they are given both ballots and choose which to vote in the privacy of the booth.

In a blanket primary, voters have the opportunity to vote for candidates from all parties that qualify for the ballot. Candidates are listed by office, and the voter can select one candidate per office. This ballot permits voters to cross from one party to another as they move through the list of elective offices.

Twenty-one states have open primaries, and 26 have closed primaries. Only three states have blanket primaries: Alaska, Washington and Louisiana. The Louisiana blanket primary differs from the primaries in Alaska and Washington in that the two candidates for each office with the most votes, regardless of party, qualify for the general election.

Alaska first adopted the blanket primary in 1947, during territorial days. Prior to that time Alaska had an open primary: at the polls, voters were given a single ballot listing the party candidates in two separate columns. Voters could vote in only one column.

In the special legislative session of 1946, when both houses of the legislature were overwhelmingly dominated by Democrats, a conservative Juneau Democrat, Curtis Shattuck, introduced House Bill 4 which would have changed the open primary to a blanket primary.

While the bill did not have sufficient support in the House to pass, there was enough interest to keep it alive. The compromise was an amendment to put the question before the voters in a referendum at the next general election (October 8, 1946). The amended bill passed the House with no dissenting votes, and it passed the Senate with only three dissenting votes.

The referendum to adopt the blanket primary passed by a wide margin.[1] There was apparently little public discussion of the issue preceding the referendum, in part perhaps because it was overshadowed by a second referendum on the same ballot – a referendum on the hotly debated question of statehood. In any case, the public seems not to have been aroused by the question of a blanket primary. The *Anchorage Daily Times* opined that the proposal "has received virtually no publicity and the vote on it will probably be unintelligent." The newspaper editorial said "nobody seems to know what it is all about." It continued:

> . . . inasmuch as the two parties in Alaska are different only in leadership and in their position as "in" or "out" of power, it can be argued that the blanket ballot would be appropriate here.
>
> Both parties are interested in developing Alaska. Either one would follow a program very similar to the other should it be placed in power. It has been said that the voters, during the primary election, separate into two parties for the purpose of eliminating some candidates for

---

[1] Unofficial returns from 46 of the 60 precincts reported in the *Anchorage Daily Times* on October 10, 1946, showed 4,225 in favor of the blanket primary and 878 opposed.

> public office and nominating others. The general election is a continuation of this process, only with the voters all using the same ballot with the candidates of the parties on the same list. Therefore, it is argued, there would be nothing lost by having a blanket ballot in the primary.
>
> We have heard no argument that is, by itself, convincing. We believe that Alaska will fare just as well no matter what form of ballot is used.[2]

A blanket primary was dutifully adopted by the Eighteenth Legislature in 1947. It passed without a dissenting vote in the House, and with two Democrats and two Republicans casting no votes in the Senate.

Increasingly, however, the question of the blanket primary became a partisan issue. Democrats tended to oppose it; Republicans to support it. Democrats believed that it eroded what little party loyalty and discipline existed in Alaska, and they thought that Republicans used it to their advantage by crossing party lines in the primary to elect the weakest Democratic candidate. Republicans supported the blanket primary in hopes that Republican candidates would benefit by attracting conservative Democrats and non-aligned voters.[3]

Despite the overall partisan flavor that the issue was to acquire (with Republicans for and Democrats against the blanket primary), opposition existed on the part of some

---

[2] *Anchorage Daily Times,* October 7, 1946.

[3] Interview with Judge (Ret.) Thomas B. Stewart. See also Herman E. Slotnick, "Alaska: Empire of the North," in Frank H. Jonas, ed. *Politics in the American West* (Salt Lake City: University of Utah Press, 1970).

Republicans, and support existed on the part of some Democrats. In general, party stalwarts and those who believe in the importance of strong parties in the political process, opposed and continue to oppose the blanket primary. Those who are not firmly aligned with a political party, and who believe that the voter should have maximum independence in balloting matters, support the blanket primary. Party loyalty has not been strong in Alaska, and legislators from both parties have responded to widespread public support for the blanket primary.

In the first session of the first state legislature in 1959, when Democrats firmly controlled both houses and the governor's office, the blanket primary was replaced by the single ballot open primary.[4] Adoption of the comprehensive election code in 1960 incorporated this change.[5]

Republicans led the opposition to the single ballot open primary, although many Democrats also sought a return to the blanket primary. Several bills were introduced to restore the blanket primary, but they languished in Democratic-controlled committees. In 1966, during the second session of the Fourth Legislature, a blanket primary bill passed the House and almost passed the Senate. Senate debate on the measure was reported in the *Anchorage Daily Times.*[6] Democrats Jim Nolan of Wrangell, Robert Blodgett of Teller, and Robert Ziegler of Katchikan spoke in favor [of] the bill. Senator Blodgett is quoted saying:

---

[4] Chapter 41 SLA 1959 (HB 8).

[5] Chapter 83 SLA 1960 (CSHB 252).

[6] March 28, 1966.

> The Democratic party is a hollow shell. The Republican party is a hollow shell. How many people actually are active workers in the two parties? Darned few. I support the bill."

Senator Ziegler is reported to have said:

> The measure is vitally important to the people of this state. In Ketchikan, probably nine of every ten voters want to vote for the man, not the party.

Despite this bipartisan show of support, the bill failed to pass the Senate.

The general election of 1966 broke the Democratic monopoly on legislative power which had existed since the 1950s: Republican majorities were elected to both Houses and Republican Walter Hickel was elected governor. The blanket primary was thereupon restored during the first session of the Fifth Legislature.[7] The bill to restore the blanket primary was introduced at the request of Governor Hickel, but it attracted considerable bipartisan support. Among the 35 yeas in the House, nine were cast by Democrats; of the five nays, four were cast by Democrats. In the Senate the bill received 18 yeas, four of which were cast by Democrats. Both nays in the Senate were cast by Democrats.

The blanket primary seems to suit Alaska, where party ties and party organizations are weak.[8] However, some

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[7] Chapter 1 SLA 1967 (HB 1am).

[8] More than half of the voters in Alaska are registered as independents. See Carl E. Shepro, "Alaska's Political Parties," Gerald A. McBeath and Thomas A. Morehouse, eds. *Alaska State Government and Politics* (Fairbanks: University of Alaska Press, 1987).

Democratic and Republican party loyalists, who lament the decline of political parties, prefer a more conventional (open or closed) primary that restricts voters to casting ballots for one party's candidates.

I hope this information is useful to you. If you would like additional information, please contact the agency.

VREMS TIME: 09:04 — STATE OF ALASKA – DIVISION OF ELECTIONS — DATE: 03/01/2000
GVRR28OP-RZ (GBVREMS) — NUMBER OF REGISTERED VOTERS BY PARTY WITHIN DISTRICT — PAGE: 1

	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
REGION 1 REGION I										
DISTRICT										
1	10,906	1,642	2,494	479	54	2,025	20	4,047	12	133
2	11,899	2,078	2,228	486	116	2,398	23	4,425	12	133
3	12,375	3,038	1,804	427	182	2,689	23	4,079	21	112
4	11,911	2,029	2,420	407	83	2,692	22	4,102	15	141
5	10,449	1,953	1,713	602	117	2,147	24	3,700	12	171
6	10,201	1,492	2,443	343	42	1,497	21	4,235	29	99
7	12,886	1,708	2,936	532	264	2,578	46	4,576	87	159
8	12,075	1,568	3,148	529	74	2,178	56	4,310	85	127
9	10,303	1,392	2,827	430	28	1,918	39	3,464	93	112
TOTAL REGION I (107) PRECINCTS)	103,005	16,910	22,013	4,235	960	20,122	274	36,938	366	1,187

	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
REGION 2 REGION II										
DISTRICT										
10	12,367	1,612	4,024	279	49	2,315	41	3,743	213	90
11	11,457	1,739	3,041	376	63	1,905	57	3,821	322	133
12	11,517	1,598	3,147	348	51	1,966	41	3,972	299	95
13	12,478	2,273	2,950	379	134	2,389	39	3,883	303	128
14	12,599	2,097	4,215	307	37	1,220	50	4,311	259	103
15	11,792	2,356	2,085	531	147	1,842	43	4,125	520	143
16	10,911	2,453	1,745	613	91	1,311	42	3,904	590	162
17	14,046	2,172	3,763	444	66	1,918	76	5,057	422	128
18	13,650	1,880	3,897	299	165	2,883	60	4,176	249	121
19	13,119	2,042	3,372	433	94	1,976	43	4,652	385	122
20	11,204	1,961	2,720	294	69	1,955	55	3,670	346	126
21	11,022	2,088	2,597	404	83	1,750	40	3,756	408	96
22	13,267	2,182	3,836	296	59	2,216	64	4,241	249	124
23	10,653	2,076	3,105	278	31	1,004	37	3,829	199	99
24	12,198	1,832	3,952	300	52	1,784	51	4,014	209	84
25	12,112	1,513	3,780	403	42	1,978	42	4,037	1292	125
26	12,647	1,457	3,653	502	49	2,094	64	4,423	259	136
27	14,574	1,718	3,949	627	91	2,693	89	4,949	315	143
28	15,887	1,663	3,955	852	102	2,848	85	5,807	379	204
TOTAL REGION II (139 PRECINCTS)	257,505	36,632	63,604	7,965	1,475	37,960	1,019	80,370	6,118	2,362

REGION 3 REGION III DISTRICT	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
29	12,462	2,131	2,478	355	278	2,582	25	4,414	64	135
30	10,492	1,891	2,462	395	69	1,832	26	3,684	39	94
31	10,663	1,977	2,283	539	52	1,764	42	3,823	41	142
32	11,275	2,098	3,323	331	37	1,268	22	4,074	36	94
33	12,533	1,513	3,642	524	81	2,230	26	4,297	65	155
34	12,939	1,727	4,626	387	68	1,501	33	4,451	37	109
35	10,313	1,386	2,482	418	123	1,975	19	3,704	80	126
36	9,041	1,855	1,497	770	67	1,762	9	2,889	48	144
TOTAL REGION III (189 PRECINCTS)	89,718	14,570	22,793	3,719	775	14,914	202	31,336	418	999

REGION 4 REGION IV DISTRICT	TOTAL	DEM	REP	AT THE	GREEN	NEW PPP	REP MOD	UNDECL	LIBERT	OTHER
37	8,852	2,228	1,125	993	38	1,231	7	3,105	23	102
38	8,161	2,310	1,009	875	26	1,493	5	2,296	17	130
39	9,077	2,678	948	839	28	1,626	6	2,817	20	115
40	6,105	1,073	1,129	307	25	1,104	11	2,369	12	75
TOTAL REGION IV (98 PRECINCTS)	32,195	8,289	4,211	3,014	117	5,454	29	10,587	72	422
STATE TOTAL (453 PRECINCTS)	462,423	76,401	112,621	18,933	3,327	78,450	1,524	159,231	6,966	4,970

AMICUS CURIAE

BRIEF

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INTERESTS OF AMICI[1]

Amici university law professors have extensive professional experience and personal interest in the study of constitutional law, particularly as applied to the American political system. They have concluded, as further indicated below, that the California blanket primary system fits well within the constitutional framework defining powers of states and protections for voters which this Court has developed. The California blanket primary – and the laws of many other states with blanket or open primaries which are implicated herein – should be upheld.

The Hispanic Republican Caucus has a particular concern in protecting rights of members of minorities to participate in the political system and has reached the conclusion that the California blanket primary is constitutionally valid because it serves to protect and advance compelling interests of such voters, including the long-term interests of the parties. Members include a recent minority leader of the California State Assembly.

William E. Brock and John McCain are long-time participants in the political process. Senator Brock was a United States Senator and Chair of the Republican National Committee for the years 1977-1980. Senator

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[1] Pursuant to Rule 37.6 of the Rules of this Court, Amici state the Respondent Californians for an Open Primary contributed to the preparation and submission of this brief, but that no counsel for a party authored this brief in whole or in part. Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of the brief, and the consent letters have been filed with the clerk of the Court.

Article IV, Section 4 of the Constitution guarantees "to every state in this union a republican form of government." This section of the Constitution has never been held to impose a single conception of what it means to have "a Republican form of government." *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), much less to prescribe a single system of elections.

For the federal offices for which the Constitution requires some form of election processes, the Constitution directly confirms in the states the authority and responsibility to establish and regulate the elections. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). This is most explicitly stated through the Constitution's grant to states of broad power to prescribe "the times, places and manner of holding elections for senators and representatives." U.S. Const., art. I, § 4, cl. 1. This election power is matched by state control over the election process for state offices.

Exercising this authority and their own authority to conduct the far more numerous state and local elections, the states have enacted diverse and comprehensive election codes. Constitutional interests in voting and in political association are both implicated and protected and enhanced hereby. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983). These interests are derived both from the United States Constitution and from the states' own constitutions.

Primary elections are conducted through a variety of systems ranging from "closed" to "open" and "blanket" throughout the United States. *See Tashjian*, 479 U.S. at 222,

n.11, setting out the wide variety of state primary systems. The range of options for primary elections is illustrated in the historic changes made in this case. The people of California determined by initiative vote to go from a "closed" to "blanket" primary based on their experience and perceived interests.

This is as intended under the United States Constitution. At the time of the Constitution, the constituent states of the United States already had their own special systems of election to protect their citizens' rights. The "powers" to do so were surely among the powers "reserved to the states respectively or to the people" under the Tenth Amendment.

The states conducted these elections before and after ratification of the Constitution. Only later did political parties evolve. Concurrently, the states evolved differing systems to select candidates for the general election. In the earliest days of the Republic, candidates were often chosen informally by a consensus of locally prominent persons (similar to town meetings which continue today in some states).

With the emergence of more formal political parties, candidates were winnowed through differing state nomination processes, including petitions, caucuses, party conventions, and later a variety of primary election systems. The states then placed "party candidates" on general election ballots. Today, all states either require or make available primary elections for nomination of candidates for elections to the U.S. Congress and for most state legislative and executive positions. However, about

a third of the states still use caucuses for one or both parties' nomination of presidential candidates.

Two principal textual limitations on state power to regulate candidates for federal office elections are the qualification clauses governing the election of members of Congress, and the ban on religious tests for office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). The text of the original Constitution is designedly silent concerning the rules governing candidate selection processes by states for elections at the state and local level. State and local elections were surely viewed as matters governed by powers of the states (preserved under the Tenth Amendment). *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (Thomas, J. dissenting opinion at 845); *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Decisions of this Court dealing with six constitutional amendments[2] have helped define modern contours of the right to vote, the right to run for office, and the right to fair representation. Within this framework the states remain free to experiment and decide how best to protect their citizens' rights. States are free to experiment with direct democracy, *e.g.*, through initiative and referendum, to use nonpartisan registration and elections for

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[2] The Fifteenth Amendment protects the right to vote. The Seventeenth Amendment requires popular election of Senators. The Nineteenth Amendment guarantees the right to vote to women. The Twenty-third Amendment permits residents of the District of Columbia to vote for President. The Twenty-fourth Amendment bars the poll tax in federal elections. The Twenty-sixth Amendment grants the vote to persons over 18. Most importantly, this Court has construed the First and Fourteenth Amendments as protecting basic rights to participate in elections.

some offices and even term limits for state and local officials (which have been held invalid for congressional office only because of the specific "qualifications clause," art. I, § 2, cl. 2).

The power of states over elections for state offices is not so constrained as it is where the federal offices are involved. *Compare Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998) with *U.S. Term Limits, supra. See also Oregon v. Mitchell, supra.*

As a very general proposition, this Court has held laws excluding voters and closing elections to be suspect under the Fourteenth (or, more rarely, the Fifteenth) Amendment analysis. For example, the "white primary" cases, cited p. 10, *infra*, held invalid laws restricting voters who participated in the primary elections. Most recently *Rice v. Cayetano*, 68 U.S.L.W. 4138 (February 23, 2000), applied the Fifteenth Amendment to special state elections, holding that special Hawaiian elections could not be closed to most people of that state in violation of that amendment.

II. THE STATE MAY ACT TO ADVANCE IMPORTANT CONSTITUTIONAL INTERESTS BY INCREASING AND PROTECTING VOTER PARTICIPATION

This Court has frequently reflected the overriding importance to citizens and to our very democracy of the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

In our democracy, that all citizens should enjoy the right to vote is not just a theoretical value. The exercise of that right to vote must also be encouraged and protected. The actual application of the right through participation in the election process is separately important to the democracy.

Elections do not just serve to select officials. Participation in the election process serves the separate purpose of legitimizing the government. "Public participation in the election of government officers is the essence of the American system of representative democracy. It is through elections, including primary elections . . . that government is legitimized." *State ex rel. LaFollette v. Democratic Party*, 93 Wis.2d 473 (1980), *rev'd on other grounds, Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981). This important purpose is served by state and local elections as well as those for national office. This important legitimizing purpose is served to a degree roughly proportionate to the amount or percentage of participation by the citizenry in elections. Thus, when the participation is increased as the blanket primary has done, the government is further legitimized.

Soon after the Constitution's ratification, the Framers adopted the Bill of Rights with the understanding they would thereby further protect the citizens and the states. The avowed intent was also to reinforce the newly created democracy. The First Amendment serves to protect individuals *and* to reinforce democracy by preserving the freedom of individuals to engage in behaviors important to democracy. Public participation through exercise of the right to vote is "the essence" of the democratic process.

The Constitution allows states to balance other constitutional interests and even to restrict First Amendment rights where necessary to preserve and expand participation in the democratic election process. In *Burson v. Freeman*, 504 U.S. 191 (1992), this Court upheld a ban involving core First Amendment interests; political speech in the election poll area. The absolute ban was upheld where the state determined this protection was necessary to improve the experience of voters who participate in elections.

The interests served in adopting the blanket *primary* system are similar; to enhance voter participation while broadening each voter's choices. These interests in a primary election are as important as those in the *general* election because the primary is a critical step in the process of selecting public officials. *Munro v. Socialist Workers Party*, 479 U.S. 189, 196 (1986).

In many states and many elections the only opportunity to cast a meaningful vote occurs in the primary. Often because of factors, such as one-party dominance, "As a practical matter, the ultimate choice of the mass of voters is predetermined when the nominations have been made." *Newberry v. United States*, 256 U.S. 232, 286 (1921) (Pitney, J., concurring); *United States v. Classic*, 313 U.S. 299, 319 (1941); *Morse v. Republican Party of Va.*, 517 U.S. 186, 205-06 (1996). The same is often true in California where a majority of legislative districts are "safe" for one party according to expert analysis and testimony below. JA 191.

This makes doubly important the need to consider and protect the rights and opportunities of voters in

primary elections. This Court recognized this factor first in the "white primary" cases: *Smith v. Allwright*, 321 U.S. 649 (1944), and *Terry v. Adams*, 345 U.S. 491 (1953). The decisive character of primary elections weighed strongly in this Court's determination to invalidate the laws allowing political parties to control primaries (rebuffing a similar claim of associational rights to that advanced by the political parties here). It can now be concluded that the long-term effects on both parties from these decisions were undoubtedly beneficial. Minorities thus allowed to participate in elections later joined and strengthened *both* parties.

Here the State and its people (by initiative) have acted to expand the ability of all California's people to participate in the democratic process. California's primary system likely has a beneficial impact even on parties – thus serving directly to implement and protect rights of all citizens of the State.

Indeed, the contrary argument of the political parties that the citizens were deprived of their rights is especially disingenuous where overwhelming numbers of Californians of all parties and demographic groups and regions voted to adopt this blanket primary to protect their accurately perceived constitutional interests. (*See* expert testimony below analyzing support for blanket primary, JA 176-178.) Further, the political parties have each already benefitted by receiving increased vote totals (ultimately reflected at other levels such as party volunteers or contributions).

When the state acts to protect and expand participation in the democratic process, First Amendment values support the state action. This is especially true where the state action was adopted by direct vote of the people, and majorities supported the initiative from all parties, demographics and geographic areas. The people are especially suited to determine their own interests and how to protect them.

Each court which has considered a blanket primary has upheld such a primary law and confirmed the constitutional interests thereby advanced. Several courts have also specifically concluded that the political parties' fears and claims were unsubstantiated (or exaggerated as found by the court below). It is significant that these courts have usually been state supreme courts closely conversant with the citizens' interests – these state judiciaries are often directly elected.

In *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 120-21 (1981), this Court summarized one state supreme court decision:

> The Wisconsin Supreme Court considered the question before it to be the constitutionality of the "open" feature of the state primary election law. . . . by encouraging voter participation, the court held the state open primary constitutionally valid. Upon this issue, the Wisconsin Supreme Court may well be correct.

Democratic Party at 120-21 referencing *State ex rel. LaFollette, supra.*

The Supreme Court of Alaska similarly upheld Alaska's blanket primary system against a First Amendment challenge, specifically recognizing that encouraging voter turnout was among the important state interests advanced by the blanket primary. *O'Callaghan v. State of Alaska*, 914 P.2d 1250, 1262-63 (Alaska 1996).

The Supreme Court of Washington after considering 55 years' implementation of that state's blanket primary found that there were three separate compelling interests served by Washington's system *and* that the political parties had demonstrated no substantial burden on fundamental rights:

> Have plaintiffs shown a substantial burden? Not only have they not shown a substantial burden, but they concede they cannot do so. . . .
>
> . . . .
>
> . . . [There are three] compelling state interests which support a blanket primary . . . allowing each voter to keep party identification, if any, secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary.

Heavey v. Chapman, 611 P.2d 1256 at 1258-9 (Wash. 1980).

Washington does not allow party registration of voters and has constitutional provision requiring "absolute secrecy in preparing and depositing his ballot." Wash. Const. art. 6, § 6. The interest in voter privacy is important, and Washington voters have resisted any state requirement of party identification. Of course, the blanket primary serves the same privacy interests of voters in

California. The political parties' argument here would frustrate this interest by making voters declare a party – before they are willing to do so – which then becomes a "public record."

III. THE RECORD CONFIRMS THE STATE'S (VOTERS') JUDGMENT THAT A BLANKET PRIMARY SERVES TO SIGNIFICANTLY ADVANCE COMPELLING INTERESTS AND BENEFITS THE PARTIES

A state is not required to quantify or prove problems in the election system – or a "cost-benefit" analysis – *before* improving the election process. "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively. *Munro*, 479 U.S. at 195-196. Here, however the record proves both the problems of the old closed primary system and benefits of the blanket primary. This record confirms the judgment of the states that a blanket primary enhances the rights of voters and democratic interests.

Under the blanket primary, each voter has a broader range of choices, and every voter has a chance to participate in both important stages of the election process. Even a careful and conscientious voter who doesn't finally decide until the date of the primary is not barred from expressing that opinion by vote (even if it *is* too late to change party registration). The satisfaction derived by each voter from participation, and the concurrent incentive to participate and support, is also unquantifiable.

However, it can be said that the voters are the appropriate judges of these intangible interests and their relative importance (relative to the same voters' associational interests in political parties).

Other results from adoption of the blanket primary are quantifiable. The most important is probably voter participation, a matter of significant concern throughout this Country. For many years, California primary elections had showed a dramatic decline in participation. A similar decline in general election turnout in California – but different in amount – also was cause for great concern. *See* expert Field, showing a 15-20% decline in last 30 years – "marked and significant decline over the last 30 years." JA 201. The decline in turnouts in the two phases of the election are related.

Historical data also showed that there was a significant difference between the lower California turnout *before* adopting the blanket primary and the substantially better turnout record of western states which had previously adopted the blanket primary. *E.g.*, in 1996, congressional races in California had a 43% turnout whereas the blanket primary states enjoyed turnout over 55%. Gerber RT 682. This strongly supported the argument that blanket primaries would encourage voter participation in both primary and general elections.

Election statistics from California's first blanket primary elections confirmed the expectation that primary voting participation would dramatically increase with implementation of the blanket primary. It was conceded below by the political parties in 1997 that allowing the

(approximately) 1.5 million independent voters to vote in the blanket primary would likely boost turnout. Field JA at 202. (RT 658-659). By 2,000 there were 1.8 million California independent voters able to vote in the primary. This increase alone could be argued to justify the change to a blanket primary.

By the time of trial, the blanket primaries which had been conducted in California also confirmed the anticipated dramatic increase in voter turnout. (*See also* Respondent Second Lodging for public records of June 1998 and March 2000 California elections.) This aspect of the State's (voters') judgment as to the merits of the blanket primary is clearly vindicated. There was a total increase of over a million and a half votes. Separately *each* of the petitioner political parties enjoyed a substantial increase in votes for their party. The mid-term general election turnout also increased approximately 2.4%, partially reflecting the effects of drawing more voters into the election in the primary. (Issues and candidates at all levels undoubtedly also have significant impacts on turnout.)

Similar fears to those of the parties here had been considered by this Court in *Tashjian*, 479 U.S. 208:

> . . . appellant's direst predictions about destruction of the integrity of the election process and decay of responsible party government are not borne out by the experience of the 29 states which have chosen to permit more substantial openness in their primary systems . . . .

479 U.S. at 233, n. 12.

among if not *the* most, highly competitive at last [sic] in part due to the blanket primary." JA 142.

The expert testimony to the court below about Washington's experience generally updated and reflected similar proof submitted to Washington courts when the Washington Supreme Court had upheld the Washington blanket primary years earlier. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980) quoted supra, p. 6.

The historical evidence thus addressed – and rebutted – the arguments or fears of the political parties which are repeated here. The Court below made a specific holding on the issue of the impact on parties finding the blanket primary system to be a "significant but *not* severe burden on their associational rights." (Br. in Opp., App. at 27, 35.) As noted above, there is a strong reason to conclude the long-term impacts on political parties are actually positive. *See, also,* Professor Olson's Summary Report, JA 133-152.

An important separate concern is the effect of the blanket primary on minority voters and candidates. The Washington expert (Dr. Olson) considered the historical record and concluded: "Thus, the blanket primary appears to be a neutral instrument when it comes to favoring or disfavoring racial minority voters and candidates." JA 149. *See, also,* JA 129.

Other expert testimony in the court below was much more positive about the empowering impact of the Washington blanket primary on minorities and women: "Any allegation that the blanket primary inhibits women and minorities from winning office is also refuted by Washington's experience," going on to document the fact

Washington has unusually high minority and women participation – *e.g.*, the highest percentage of women in any states legislature JA 194 (Quinn Report, favorably cited through Circuit Court Opinion).

A similar conclusion has been reached by the California Hispanic Republican Caucus, indicated by their participation as amici in this brief supporting the blanket primary. Especially with long-term demographic changes in minority populations, the parties will benefit through a primary system which allows or encourages early affiliation by minority voters through primary participation – leading to general election and other longer term support.

Amicus William E. Brock, a former national party chairman, had observed similar effects: the Republican Party was benefitted by the opening of primaries in that party's efforts to become viable in previously one-party southern states. The party became competitive and now often enjoys a majority in some states – in part because of the open primary system. Of course, *Tashjian*, 479 U.S. 208 (1986), reflected a similar conclusion by the same party in another state. A party rule sought to open its primary – but was frustrated by state law (dictated by the other party). Indeed, the facts in *Tashjian* reflect that both parties expected a positive effect on the minority party's building efforts.

Amicus John McCain has recent experience illustrating the related conclusion that either national party could benefit through attracting and allowing voters to participate in that party's primary – without first requiring full party registration.

CONCLUSION

The blanket primary is a constitutionally valid state regulation of elections which protects the constitutional interests of voters. The decision below should be affirmed.

Respectfully submitted,

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